THE AMERICAN LAW REGISTER AND REVIEW

PUBLISHED MONTHLY BY MEMBERS OF THE DEPARTMENT OF LAW OF THE UNIVERSITY OF PENNSYLVANIA.

SUBSCRIPTION PRICE, $5.00 PER ANNUM. SINGLE COPIES, 50 CENTS.

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THE MAGAZINE. Through the courtesy of Hon. Charles C. Bonney, President of the World's Congress Auxiliary of the World's Columbian Exposition, THE AMERICAN LAW REGISTER AND REVIEW has been accorded the privilege of printing for the first time a number of the articles and papers read before the Congress on Jurisprudence and Law Reform. Possibly no feature of the great fair was more welcomed by the scientific and educational world than the various congresses which were assembled through the efforts of the Auxiliary Committee, and of these none was more beneficial in its tendencies than that to which we have referred. The work of Hon. Charles C. Bonney as the head of the general department is, doubtless, familiar to all who followed the work of the Committee, and was characterized by a spirit of earnestness and ability which to which the success achieved is chiefly due.

It is our purpose to publish a number of these articles, since the importance of the subjects and the ability of the writers fully warrant the belief that they will be of great interest, presenting, as they do, theoretical discussion, sometimes comparative, always analytical,

of topics which cannot but be of vital importance in the general development of the system of jurisprudence.

In our present issue we have presented the first of these papers—viz.: "*Limitation of the Amount One May Take by Descent or by Will*," by Hon. Harvey B. Hurd, of Chicago, and "*Uniformity in Marriage and Divorce Laws*," by Prof. Edmund H. Bennett, of Boston. And in our succeeding issue we hope to begin the publication of a series of comparative papers upon the administration of civil and criminal justice in the different countries of the world.

De Facto Officers. The case of *State* v. *Gardner*, decided in January by the Supreme Court of Ohio, (42 N. E. Rep. 999,) discusses the question whether there can be such a thing as a *de facto* office. The facts were that defendant was indicted in the Common Pleas for offering a bribe to one Hugill, Commissioner of the City of Akron; and he demurred to the indictment on the ground that the Act of April 20, 1893, creating the municipal government of Akron, in virtue of which Hugill was exercising his duties, was unconstitutional and void. The demurrer was sustained. Exceptions being taken the case was brought to the Supreme Court for review, and the judgment was reversed, (Shauck, J., dissenting). The decision was based on the doctrine that the official acts of public officers cannot be collaterally attacked by calling in question the constitutionality of the act creating them. This decision, so stated, is perfectly in accord with sound rules of law. Granting that this is a collateral attack, we must admit that the act of the officer must be upheld.

This view is established by a consideration of what constitutes a *de facto* officer. Lord Raymond in *Parker* v. *Kirr*, 1 Ld. Raym 658 (1703), says he is "one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." In a case in 1876 in Massachusetts (*Petersilea* v. *Stone*, 119 Mass. 465), it was said that "third persons from the nature of the case, cannot always investigate the right of one assuming to hold an important office, even so far as to see that he has colour of title to it, by virtue of some appointment or election." On the other hand, it is stated by Field, J., in *Norton* v. *Shelby Co.*, 118 U. S. 425 (1885), that "no cases sanction the doctrine that there can be a *de facto* office under a constitutional government, and that the acts of the incumbent are entitled to consideration as valid acts of a *de facto* office." Here, however, the attempt was to a create a special tribunal, there being already one properly constituted in existence and therefore the term *de facto* could not be applied to that which was void *ab initio*. A similar state of facts existed in *Hildreth* v. *McIntire*, 1 J. J. Marsh, 206 (1829). There the court expressly distinguished the case from that of a revolutionary government in which "there is no government in action except the government *de facto*, because all the attributes of sovereignty have by

usurpation been transferred from those who had been legally invested with them to others who, sustained by a power above the form of law, claim to act and do act in their stead." This practically covers the present case, for their being no government except the unconstitutional one, and that government having been acquiesced in for two years, or as Lord Raymond says, "having acquired a reputation for being correct," is a government *de facto* and cannot be collaterally attacked.

There is another view to take of this case which leads us to question very strongly the decision though not the principles laid down. The definition given by Van Fleet, § 3, of a collateral attack on a judicial proceeding, is that it is "an attempt to avoid, defeat or evade it, or to deny its force and effect in some manner not provided by law." The crime under which Gardner was indicted is defined by statute to be "corruptly giving, promising or offering to an officer anything of value, etc." The averment in the indictment states that the person bribed was an officer and therefore puts that question directly in issue. It is a material part for if there were no officer there could be no such crime as the one charged. It cannot come within the definition of collateral attack given above, because it is clearly provided by law that a person can attack any material part of an indictment. Therefore it is submitted that the unconstitutionality of the statue being directly in issue, defendant had a right to avail himself of that defense.

CHASTITY OF WITNESSES. In a recent decision, the Supreme Court of Missouri has placed itself on record as once more espousing a doctrine in the law of evidence that it had formerly maintained, but had in later years repudiated. By its last action it deliberately assumes an unenviable and unique position, which finds no precedent in any jurisdiction, and which is as untenable on principle as it is unjust in its practical results. The case is that of *State* v. *Sibley*, 33 S. W. Rep. 167, and in it the majority of the court express it as their opinion, that while general reputation for unchastity is a ground for impeaching the veracity of a female witness, there is no basis for the application of the same rule in the case of a male witness. The opinion is not very fully considered, and its weight as an authority is weakened by the fact that three of the judges dissented from the views expressed by the majority of the court.

This strange anomaly in the Missouri law had for its origin a dictum in a former case: *State* v. *Grant*, 79 Mo. 133 (1883), where the court, after deciding that general moral character, as well as reputation for veracity, may be inquired into to impeach a witness, adds, "and this ruling has been made in cases as to general reputation of a female witness respecting chastity."

It is a very debatable question whether the ground for impeaching a witness upon reputation should be extended beyond that of reputation for veracity, and the prevailing rule deduced from the

cases is that general moral character does not afford a safe criterion for testing the truthfulness of a witness. But if it be that the inquiry should extend to moral character, it is difficult to see upon what reasoning it is possible to differentiate chastity from moral character, and to arrive at the conclusion that it forms an ingredient of the character of a female witness, but has no essential connection when the moral status of a witness of the opposite sex is in question. Such a view may find some support in the different treatment accorded the sexes by the practice of modern society, but that is rather a cause for adverse reflection upon the moral standard adopted by society than for arguing its adoption in a court of law, whose proceedings are supposed to be dominated by reason, and not by arbitrary custom. There can be no justification for the introduction of evidence of unchastity to impeach the veracity of a witness of either sex, except it be upon the broad ground of general moral character, and when it is placed upon that ground, every reason that can be urged for its admission in one case is equally applicable to its admission in the other. This is the plain sense of the question, and it should not be allowed to be perverted by sophistry born of an unjust social regime. Either the test of general moral character should be abandoned, or else it should be carried out in an equitable and consistent manner.

LIMITATION OF COMMON CARRIER'S LIABILITY. A recent case, *Baltimore & O. S. W. R. R. Co.* v. *Ragsdale*, 42 N. E. Rep. 1106, (App. Ct. of Ind., Feb. 19, 1896) contains a dictum to the effect that a common carrier cannot by contract limit the amount of a shipper's recovery, although he may agree with the latter upon a valuation of the property carried, which shall be conclusive in case of loss. As this question is far from being settled, some discussion of the principles involved might not be untimely.

The Common Law rule, holding the carrier to be an insurer against every injury to the goods shipped, except those caused by the act of God or the public enemy, was a necessary one, considering the state of the times and the small amount of business transacted. It is clear that it would have been both easy and profitable for a carrier to enter into collusion with robbers, or even with his own servants, and so share the profits of the scheme to defraud the shipper; for the latter was completely at the carrier's mercy, being unable to prove how the loss had occurred.

But at the present time these reasons for a strict rule have practically vanished. The question arises, then, to what extent should the law upon the subject be relaxed? The leading case is *Hart* v. *Pa. R. R. Co.*, 112 U. S. 332 (1884), in which the court held that the shipper was bound by the terms of the contract of affreightment, and was limited in his recovery to the amount therein stated. The clause in the contract referring to the carrier's liability was as follows: "On condition that the carrier assumes a liability on the stock to the extent of the folllowing agreed valuation, . . .

not exceeding," etc. The court (*per* Blatchford, J.,) cited with approval: *Newburger* v. *Howard & Co.'s Express*, 6 Phila. 174 (1866); *Squire* v. *N. Y. Central R. R. Co.*, 98 Mass. 239 (1867); *Hopkins* v. *Westcott*, 6 Blatchford 64 (1868); *Belger* v. *Dinsmore*, 51 N. Y. 166 (1872); *Oppenheimer* v. *Express Co.*, 69 Ill. 62 (1873); *Magnin* v. *Dinsmore*, 70 N. Y. 410 (1877); *Elkins* v. *Transportation Co.*, 81 Pa. 315 (1876); *R. R. Co.* v. *Henlein*, 52 Ala. 606 (1875); *Harvey* v. *R. R.*, 74 Mo. 538 (1881); *Graves* v. *R. R.*, 137 Mass. 33 (1884), and a few others.

In all these cases the language of the contracts was similar to that in *Hart* v. *R. R. Co.*, and the meaning exactly the same. Close attention to the words used reveals that there is in every one of the contracts, a limit set to the shipper's recovery in case the goods carried be injured or lost; for it could hardly be said that, if the goods were actually worth *less* than that limit, the shipper would be able to recover more than their real value. The language used, that the "carrier assumes a liability *to the extent*" of the valuation, clearly indicates that a maximum limit is meant, not a liquidation of damages, in which the exact value of the articles shipped is attempted to be reached.

For this limitation upon the amount of his recovery, the shipper has a good consideration in the reduction of the charges for the carriage of his goods. That these charges are based on the risk assumed by the carrier, is plainly brought out by Lord Mansfield in the early case of *Gibbon* v. *Paynton*, 4 Burr. 2298 (1769). Of course, if the shipper could show that there was not this due proportion between the extent of the carrier's liability and the freight charges, then the contract would be set aside and he would be allowed to recover for the entire value of the article lost: *McFadden* v. *Mo. Pac. R. R. Co.*, 92 Mo. 343 (1887).

There are many cases which hold that such contracts are not valid, and of them *R. R. Co.* v. *Wynn*, 88 Tenn. 320 (1889) is, perhaps, typical. There the court considered that the contract was an exemption by the carrier from his liability for negligence, which is expressly denied to him in numerous cases, of which *R. R. Co.* v. *Lockwood*, 17 Wall. 357 (1873) is the best known. The Tennessee court then tries to draw a distinction between the case at bar, and *Hart* v. *R. R. Co.*, and kindred cases, by saying that in them there was an *agreed valuation*, which was properly held to estop the shipper from claiming a greater sum.

The language of the contract in *R. R. Co.* v. *Wynn*, was: "The amount claimed shall not exceed," etc. It is worthy of note that in the case of *R. R. Co.* v. *Henlein*, 52 Ala. 606 (1875), one of the cases in which the limitation was upheld, and approved of in *Hart* v. *R. R. Co.*, precisely the same contract was before the court, the railroad company which gave the bill of lading being the same in both cases.

But if the so-called "agreed valuation" in *Hart* v. *R. R. Co.*,

was nothing more nor less than a limitation of liability, then this attempted distinction falls to the ground. As to the question of limitation or exemption in cases of negligence, it is clear that no want of care is induced, as the carrier is liable up to the limit set; and if the loss arise from negligence, the restriction put upon the amount of the shipper's recovery will only be upheld if it be fairly based on the freight charges. This view is clearly stated in the opinion in *Hart* v. *R. R. Co.*

The reason that so many of the courts refuse to enforce contracts to limit the recovery of the shipper, is that they cling to the old Common Law rule. They are perfectly correct in saying that the carrier cannot *of himself* defeat the liability imposed upon him by law, because he exercises a public calling and the shipper can always insist upon his Common Law rights. But when the shipper chooses, in consideration of reduced rates, to waive those rights, in whole or in part, there would seem to be no reason why he should not be estopped from claiming more than the stipulated value, which he has himself agreed shall be the limit of the carrier's liability for the purposes of that transaction.

This thought is expressed in *R. R. Co.* v. *Hale*, 6 Mich. 242 (1859): "We unhesitatingly say that the company cannot restrict their Common Law liability as carriers in any way. . . . Whether they can enter into a contract with an individual desiring to employ them, by which such individual relinquishes some of the rights which the law, in the absence of a contract, gives to him, is quite another question, and involves the power of all who seek to employ them, to contract respecting such employment. It is the unfortunate form in which this question has been presented that has surrounded it with difficulties, or suggested any doubts. The idea prominently conveyed by the question is, that of the *ex parte* action of the company, and this arises from the form of the question—can the company "restrict" or "limit," etc.—which suggests that of individual action. But when a contract is made, there are at least two parties acting, and to hold that the liability of the company is inflexibly and unalterably fixed by law, denies to parties employing them the right of making any contract with them, upon any consideration by which the liability of the company may be lessened. . . . Now, the contract of an individual with the company, made to subserve his interest, is not a restriction by the company of their Common Law liability, even though a diminution of such liability results therefrom," etc.

This would seem to be the correct view of the question, for it is difficult to understand, if public policy is to favor the freedom of contract, why such contracts should not be upheld by the courts, instead of being condemned as contrary to public policy. As such limitations seem to be in direct accord with the requirements of modern business, and as they have been approved in several well-considered cases, it seems a safe prediction that they will soon be recognized by all the courts, and, when reasonable in their

terms, will be sustained against shippers who claim an amount greater than that agreed upon.

The true test, then, in every case, must be whether the due proportion between the limit of the carrier's liability and his compensation for carriage, has been maintained, rather than whether the contract contains an "agreed valuation," or an "exemption from liability for negligence."

CONCLUSIVENESS OF FOREIGN JUDGMENTS. The important subject of the effect of a foreign judgment *in personam* when sued upon in our courts, which had remained without an authoritative determination from the time of the institution of our government, has lately received careful consideration by the Supreme Court of the United States in the case of *Hilton* v. *Guyot*, 159 U. S. 113. The case marks an epoch in our legal history, inasmuch as in it a divergence is made in our law from the well-established English rule upon this same question. After much vacillation, the English courts have decided that, with the one exception of fraud practised by the plaintiff in procuring it, such a judgment, by a court of competent jurisdiction and upon regular proceedings, shall be conclusive upon the merits of the case. This rule is based upon the principle that the adjudication by the foreign court creates a legal obligation which the defendant is bound to satisfy. By the decision in *Hilton* v. *Guyot*, the English rule and its principle are declared to be no part of our law. Justice Gray makes a profound review of the English and American cases, and an elaborate examination of the existing laws and usages among civilized nations, and arrives at the conclusion that our comity extends the effect of *prima facie* evidence to foreign judgments, and that it is sufficient ground to impeach the conclusiveness of the judgment that the courts of the country from which it comes do not grant reciprocal effect to judgments of our courts. Therefore the fact that by the law of France, from which country the judgment in this case was brought, no reciprocity is extended to judgments of foreign courts, was held sufficient reason to examine anew the merits of the case.

It is the adoption of the principle of reciprocity as a part of our law that forms the striking feature of the case, and gave rise to dissent upon the part of four members of the court and to adverse criticism in some legal periodicals. This part of the decision was reached upon the precedent of the laws and usages of a preponderating number of civilized nations, and upon the broad ground that international law is founded upon the principles of mutuality and reciprocity. The adoption of reciprocity as the determinative factor in the treatment of foreign judgments seems but a consistent following of the conception that permeates all other dealings among the nations, which have become general enough to be termed international. Wherever a custom has arisen to the dignity of public international law, it has been upon the basis of reciprocal rights and obligations; so also where treaties are made for the regulation

of international conduct, they proceed upon a recognition of mutual comity; and every reason that justifies the adoption of such a policy in those cases is an argument in favor of raising the interchange of comity as respects the enforcement of foreign judgments to the same high plane. Inasmuch as such judgments can *ex proprio vigore* have no extra-territorial effect, but must depend upon the comity of the several nations for any obligation that may attach to them outside of the jurisdiction of the courts pronouncing them, it is in strict keeping with the nature of international relations that there should be attached to their enforcement a tacit agreement that the nation to whom this comity is extended shall reciprocate in kind. This makes the interchange of relations in the form of a compact, and preserves to each nation the dignity of its sovereignty. It is another step in the direction of systematic uniformity in the regulation of international relations, and is a partial fulfillment of the prediction of Judge Story in his *Conflict of Laws*, to the effect that the principle of reciprocity in the treatment of foreign judgments was a just one, that would probably work itself generally into international jurisprudence.

BOOK REVIEWS.

THE PRINCIPLES OF THE AMERICAN LAW OF BAILMENTS. By JOHN D. LAWSON, LL.D. St. Louis: The T. H. Thomas Law Book Co. 1895.

In this volume Professor Lawson has endeavored to give a complete view of the modern law of bailments, as found in American authorities, and, as usual, he has carried out his purpose admirably. For, not content with treating of merely the ordinary cases of bailment, he has included within the scope of his work the comparatively rare cases in which the principles of this branch of the law have been applied to telegraph and telephone companies, and other such agencies. The rules in relation to the responsibility of carriers of goods and passengers are, of course, fully discussed.

Bailments, according to the author, fall into two great divisions: the first, that which includes all the cases of ordinary bailment between private individuals, known to the Civil Law, and the second, that which includes all public agencies, such as innkeepers, common carriers, and the like, whose liability is governed by different rules from those which apply to cases falling within the first division. This latter division, especially that relating to common carriers, forms by far the major portion of the book; and it is treated in a masterly style, which calls for high commendation. There is no other text-book in existence in which the rules as to the duties and liabilities of common carriers, are so clearly and tersely defined, and so fully and yet briefly discussed, as in the part of this work